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No. 94-179

In The Supreme Court of the United States

OCTOBER TERM, 1994

CENTRA, INC.,
CENTRAL TRANSPORT, INC.,
AND
CENTRAL CARTAGE COMPANY,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent's October 7, 1994 Brief in Opposition to the Petition for a Writ of Certiorari ("Brief in Opposition") contains material admissions which were never before made by the National Labor Relations Board ("Board") in any court or proceeding below. In its response to the request of Petitioners CenTra, Inc., Central Transport, Inc. and Central Cartage Company (collectively "CenTra") before the Court of Appeals for the Sixth Circuit, the Board asserted a general denial of any wrongdoing but failed to admit the occurrence of clandestine prehearing contacts between CenTra's former Vice President Labor Relations and current labor consultant, Charles Garavaglia ("Garavaglia") and the Board attorney Paul Lund ("Government Attorney Lund").

In its Brief in Opposition, the Solicitor General for the first time admits to the clandestine complicity of the Board with Garavaglia and the concealment of that relationship from CenTra. This admission comes after seven years of unjustified silence, concealment and avoidance by the Board. The Board's admission of its improper contacts was calculated to occur only *after* the record below had been closed.

Unless CenTra is granted the opportunity to have the proceedings reopened, the Board will have profited by its improper acts, scheme of deception and sharp practice of its counsel.

I.

RESPONDENT ADMITTED ITS IMPROPER CONDUCT BUT DENIED ITS OBLIGATION TO ACT WITHIN THE APPLICABLE CANONS OF ETHICS

The Board admitted its contacts with Garavaglia in preparation of the Board's case, thereby also acknowledging a misleading or perjurious response of Garavaglia during cross-examination. However, the Board attempted to falsely justify certain of the admissions and to trivialize those admissions.

A. The Board Admitted That It Discussed The Case With Garavaglia In Preparation Of The Case.

> "In fact, Lund had two brief telephone conversations with Garavaglia shortly before the hearing commenced before the ALJ on March 23, 1987." Brief in Opposition, p. 11, n.7.

That was the first time that the government admitted the Board's complicity with Garavaglia. The Solicitor General does not give exact dates for the times that Government Attorney Lund spoke with Garavaglia but suggests that it was "shortly before the hearing commenced before the ALJ on March 23, 1987." Brief in Opposition, p. 11, n.7.

The dates of contact and the discussions that ensued are critical to a defense of the charges against CenTra. At all times relevant to the Board charges, Garavaglia was either CenTra's Vice President Labor Relations or their labor consultant under written contract. That is true through the time of the proceedings before the Administrative Law Judge ("ALJ"), the affirmance by the Board and the initial appeal to the Court of Appeals for the Sixth Circuit.

B. Government Attorney Lund Compounded His Improper Actions By Allowing Garavaglia To Mislead The ALJ.

Government Attorney Lund was aware that Garavaglia was intentionally misleading the ALJ concerning his cooperation with the Board when Garavaglia denied making any statements of any sort to a representative of the Board. *See* Petition for Writ, p. 15.

Yet Government Attorney Lund sat silently as Garavaglia denied contact with the Board. Government Attorney Lund knew that Garavaglia's testimony was either perjurious or misleading and that CenTra's counsel was completely unaware of his prehearing contacts with Garavaglia.

The Board now attempts to minimize the impact of those improper contacts, misleading testimony and complicity in the testimony by the Board by claiming that Garavaglia was only denying that he had given written statements to the Board — that the definition of "statement or [any]thing of that sort" ruled out verbal statements and clandestine meetings. Brief in Opposition, p. 10; *See* Petition for Writ, p. 15. Even a cursory reading of the questions and answers demonstrates the falsity of that position.[1]

The following conclusions are inescapable:

(1) Garavaglia either lied to or misled the ALJ, CenTra and CenTra's counsel;

(2) Garavaglia's false testimony was condoned by the silent acquiescence of Government Attorney Lund;

(3) Government Attorney Lund was an officer of the Court and a member of the Ohio bar;

(4) Garavaglia's testimony was damaging;

(5) Garavaglia's testimony was given substantial weight because of his position with CenTra, because he was the government's witness although formerly employed by CenTra and presently working as CenTra's labor consultant, and because he was the first witness called during the proceedings;[2]

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[1]The Board also attempted to trivialize its hidden agenda by claiming that "it would have served no useful purpose for the Board to have obtained a monetary judgment against D&S, as D&S had become defunct by the time of the time of the hearing." Brief in Opposition, p. 9. That is simply not true. D&S remained in business for years after the ALJ proceedings and itself commenced a lawsuit in federal district court in 1992. *See D&S Leasing, Inc. v. Bobier*, Case No. 92 CV 0209 (U.S.D.C. N.D. Ohio, filed January 29, 1992).

[2]It is a common trial practice to call as one's first witness a strong spokesperson for counsel's position to influence the trier of fact and to place the opponent on the defensive.

(6) Had the ALJ been informed that Garavaglia was the labor representative of D&S, Garavaglia's testimony might have been considered the testimony of an interested D&S representative rather than the admissions of CenTra;

(7) Garavaglia was the craftsman of the relationship between D&S Leasing, Inc. ("D&S") and CenTra. Garavaglia structured the relationship to saddle CenTra with the liabilities of D&S. This occurred during a time that Garavaglia was working on behalf of D&S without CenTra's knowledge. Garavaglia owed CenTra a fiduciary obligation as either an employee or a consultant; and

(8) Government Attorney Lund was aware of Garavaglia's personal interest in having D&S released from liability. That release occurred without prior notice to CenTra at the commencement of the proceedings before the ALJ and immediately before Garavaglia was called by Government Attorney Lund as the Board's first witness. CenTra only found this information after the record was closed. It was hidden from CenTra by the false testimony of Garavaglia in denying contacts with the Board.

C. Government Attorney Lund Was Subject To The Professional Canons Of Ethics Of The State Of Ohio.

The Board attempts to justify its contacts with Garavaglia as being good governmental lawyering authorized by the NLRB Casehandling Manual.[3] Brief in Opposition, p. 10-11. That is nonsense.

Government Attorney Lund was practicing law in the state of Ohio. Attorneys registered in Ohio who work for the federal or

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All of that was accomplished with Garavaglia's pre-planned testimony. *See* R. Keeton, *Trial Tactics and Methods* 23 (2d ed. 1973).

[3]Contrary to the Respondent's assertions, the Casehandling Manual is intended only to provide guidance for the Board's staff and has no substantive or procedural effect. The manual does not exempt Board attorneys from the ethical obligations imposed on all attorneys, rather the Board's staff members are expected to exercise "professional judgment". Introduction and Statement of Purpose, NLRB Casehandling Manual (Pt. 1) (June 1989).

state government are subject to the Ohio Code of Professional Responsibility while employed by the government. *See, e.g. Cuyahoga County Bar Ass'n v. Gerstenslager*, 45 Ohio St. 3d 88, 543 N.E.2d 491 (1989); *Office of Disciplinary Counsel v. Gorman*, 43 Ohio St. 3d 166, 539 N.E.2d 1120 (1989) (Assistant United States Attorney permanently disbarred in Ohio for violating Ohio Code of Professional Responsibility); *Office of Disciplinary Counsel v. Smakula*, 39 Ohio St. 3d 143, 529 N.E.2d 1376 (1988); *Office of Disciplinary Counsel v. Head*, 20 Ohio St. 3d 16, 489 N.E.2d 702 (1985).[4]

The Ohio Disciplinary Rules prohibit a lawyer from communicating with a party represented by counsel unless such counsel consents to the communication or the communication is authorized by law. Ohio Code of Professional Responsibility DR 7-104 (1974). When the party is a corporation, the prohibited class includes officers or employees who could commit the corporation to a position.[5] Government Attorney Lund was prohibited from communicating with Garavaglia who, as CenTra's labor representative, clearly had the authority to commit CenTra. CenTra's counsel's consent was never sought. *See Meat Price Investigator's Ass'n v. Spencer Foods, Inc.*, 572 F.2d 163 (8th Cir. 1978); *In re FMC Corp.*, 430 F. Supp. 1108, 1110-11 (S.D.W.Va. 1977).

If that were not clear enough, the Ohio Code Disciplinary Rules prohibit *ex parte* contact with former employees if the employees' conduct gave rise to the dispute. Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Advisory Op. 20 (1990). It is undisputed that Garavaglia negotiated CenTra's leasing contracts and handled its labor relations with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters Union"),

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[4]Other courts have found that the Canons of Professional Conduct are applicable to attorneys for the United States. *See In re FMC Corp.*, 430 F. Supp. 1108, 1110 (S.D.W.Va. 1977) (government concedes that the canons are binding upon United States Attorneys and attorneys of the Environmental Protection Agency).

[5]"Where an officer or employee can commit the corporation, opposing counsel must view the officer or employee as an integral component of a party for the purposes of the Code." Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Informal Op. 1377 (1977).

which represented the complaining employees who were involved in the proceeding before the ALJ. During all times relevant to the facts of this case, Garavaglia was CenTra's spokesman to the Teamsters Union, the workers and all leasing companies with which CenTra dealt.

Clearly, then, Government Attorney Lund was compelled by the Ohio Code of Professional Responsibility to forgo contact with Garavaglia in the absence of consent by CenTra's counsel. The supervising attorneys of Government Attorney Lund are also responsible for failing to disclose his inappropriate actions.[6] That supervisory control liability continues up the chain of supervision at the Board to all attorneys who knew of the ethical breach.[7]

The lack of statutorily guaranteed discovery rights in Board proceedings means that an unethical Board attorney and his supervisory attorneys could act improperly and prevail before the Board, conceal their misconduct while the record is still open and then disclose their misconduct with impunity before this Court after the record has closed. The result is that CenTra is left without remedy and without ever receiving due process of law.

II.

A WRIT OF CERTIORARI SHOULD BE GRANTED FOR THE REASON THAT ACCEPTANCE OF RESPONDENT'S INTERPRETATION OF *DEMJANJUK* WOULD RESULT IN A CONFLICT BETWEEN THE CIRCUITS

The Solicitor General argues that the decision of the Court of Appeals for the Sixth Circuit in *Demjanjuk v. Petrovsky*, 10 F.3d 338 (6th Cir. 1993), *cert. denied*, No. 93-1875 (October 3, 1994) is not applicable to Board proceedings, but only to "denaturalization and extradition cases". Brief in Opposition p. 11 n.8. If so, the Court must then reconcile the *Demjanjuk* holding

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[6]Ohio Code of Professional Responsibility DR 1-103 (1987); Supreme Court of Ohio Board of Commissioners on Grievances and Discipline, Advisory Op. 01 (1990).

[7]Model Rules of Professional Conduct Rule 5.1 (1983).

regarding the candor required of government attorneys with the decision of the Court of Appeals for the Fourth Circuit in *United States v. Shaffer Equipment Co.*, 11 F.3d 450 (4th Cir. 1993), where the court held that a government attorney has a duty of candor in civil cases.

In *Shaffer*, attorneys for the Environmental Protection Agency ("EPA") learned in the course of administrative proceedings that the EPA On-Site Coordinator had misrepresented his academic credentials and qualifications. Despite their knowledge of this conduct, the EPA attorneys did not disclose the information and were found to have breached their duty of candor to the court in the subsequent Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") collection action. The district court imposed the sanction of dismissal of the case and the government appealed.

The Fourth Circuit held that dismissal of the government's action was too severe a remedy, and remanded for determination of an appropriate remedy based upon certain enumerated factors. *Shaffer*, 11 F.3d at 462. *See also Coleman v. American Red Cross*, 23 F.3d 1091 (6th Cir. 1994). The court reasoned that the evidence of bad faith demonstrated by an administrative agency official in compiling the administrative record justified further inquiry outside the record. Moreover, the court held that this relief was required on remand because of the inherent difficulty in isolating the impact of the fraudulent misconduct on the proceedings, due to the EPA attorneys' failure to disclose evidence of the On-Site Coordinator's misrepresentations.[8]

The import of *Shaffer* and *Demjanjuk* requires that CenTra be afforded an opportunity to conduct discovery and to present evidence concerning the misconduct of the Board attorneys at a hearing. This point is particularly significant in light of the fact that the parties in the *Shaffer* decision had recourse to the broad

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[8]As in *Shaffer*, it is impossible to discern what effect the presence of Garavaglia's perjured testimony and resulting absence of evidence elicited on cross-examination had on the ALJ's decision regarding joint employer status. Therefore, the Board's contention that other evidence before the ALJ would have led him to the same conclusion, regardless of his lack of knowledge concerning Garavaglia's role with D&S, must be rejected.

and extensive discovery permitted under the Federal Rules of Civil Procedure.[9] By contrast, proceedings before the Board provide for exceedingly limited discovery, to which no response is permitted until immediately prior to the proceedings before the Board.

Given the eleventh hour admission by the Solicitor General that there were, in fact, communications between Garavaglia and Government Attorney Lund, and the perjured testimony of Garavaglia thereby revealed, remand for an evidentiary hearing to determine the role of Garavaglia in engineering the D&S/CenTra contractual relationship is required. To hold otherwise would necessarily require this Court to construe the decision of the Sixth Circuit in *Demjanjuk* in a manner which conflicts with the Fourth Circuit's decision in *Shaffer*. Such a conflict should be resolved by this Court.[10]

CONCLUSION

The Board should not be allowed to act without regard to applicable canons of professional responsibility, to create a one-sided record, to seek victory over truth and then, only after the record below is closed, admit to clandestine contacts with the labor representative of CenTra. The Board should not have had the opportunity to discuss and influence Garavaglia's testimony prior to the Board's hearing without CenTra's knowledge and consent.

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[9]Pursuant to the Board rules established by the General Counsel under Section 3(d) of the Act, the Federal Rules of Civil Procedure concerning discovery are not applicable to Board proceedings. *See* NLRB General Counsel Rule 10352.1.

Accordingly, CenTra submits that, in view of the perjured testimony of Garavaglia, it was impossible to assess the credibility of his testimony concerning his role at D&S when he was Vice President Labor Relations for CenTra. This evidence was not discoverable given the Board discovery procedures, and thus was not adduced before the ALJ.

[10]In the alternative, should the Court find that all government attorneys are held to a duty of candor which does not permit tolerance for perjured testimony, then an issue of national scope and importance regarding the standards of conduct applied to government attorneys is presented which justifies granting a writ of certiorari.

Neither the ALJ, the Court of Appeals nor even CenTra, however, had proof of the Board's impermissible contact until the Solicitor General's admissions in its Brief in Opposition. CenTra should be given the opportunity to have the fact finder determine any alleged liability under rules of procedure applicable to all litigants. This matter should be remanded to the fact finder to reopen the record to consider these additional factors.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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